

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

JOINT MOTION FOR ENTRY OF PROTECTIVE ORDER

Complainant, Maher Terminals, LLC and Respondent Port Authority of New York and New Jersey hereby submit this Joint Motion for Entry of Protective Order pursuant to the Scheduling Order issued on January 29, 2016. Attached hereto is the jointly agreed proposed Protective Order.

Dated February 18, 2016

Respectfully submitted,

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 12-02

MAHER TERMINALS LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

PROTECTIVE ORDER

Upon consideration of the joint motion of the parties for entry of the Proposed Protective Order, this order will govern protection of information and documents produced in discovery

1 **Scope:** The provisions of this Protective Order shall govern the use and handling of all discovery including Confidential Information as defined below, in the forms of documents (hardcopy, electronic format, or otherwise), testimony, written responses to discovery, and all other information in whatever form produced or provided by any Party pursuant to the Proceeding, and all documents and materials that reflect such information. For purposes of this Protective Order, the term "document" shall be given its broadest possible construction to include all written, recorded, or graphic matter whatsoever, and all copies (identical and non-identical) thereof.

2. **Definition of Confidential Information:** A Party may designate as "*Confidential Information*" only information that is a trade secret, proprietary, or commercially sensitive, and is not publicly known, which may include information provided by the parties in other proceedings including, *APM Terminals North America, Inc. v The Port Authority of New York and New Jersey v Maher Terminals LLC, FMC No 07-01* (the "*07-01 Litigation*") and *Maher Terminals, LLC v The Port Authority of New York and New Jersey, FMC Docket No 08-03* (the "*08-03 Litigation*") and information provided by third parties, including information produced by APM Terminals, North America, Inc. in the 07-01 Litigation or otherwise, with the expectation that the information remain confidential. Each Party that designates information or items for protection under this Protective Order bears the burden of proof to show that such protection is warranted and must take care to limit any such designation to specific material that qualifies under the appropriate standards.

3 **Persons to Whom Confidential Information May be Disclosed:** In accordance with Section 4 hereof, or with prior order of the Presiding Officer, and subject to the terms hereof, Confidential Information and any information derived therefrom may only be disclosed to the following persons

- (a) counsel for the Parties, including, without limitation, in-house counsel and former in-house counsel for the Parties, and their legal, paralegal, and clerical staff, third-

party vendors retained by a Party for purposes of assisting with document processing and/or production in connection with this Proceeding, and videographers and court-reporters engaged for the preparation of verbatim transcripts in this Proceeding;

- (b) employees of the Federal Maritime Commission ("FMC" or "Commission"),
- (c) independent experts and consultants retained by a Party for purposes of this Proceeding;
- (d) Richard Larrabee, Dennis Lombardi, Steven Borrelli, Robert Evans, Jason Kirin, Marios Phili, Titus Massey, Tennysun Bruney, Molly Campbell, Samuel Ruda, Michael Bozza, Andrew Saporito, M. Brian Maher, Basil Maher, Randy Mosca, Scott Schley, Anthony Ray, Frans van Riemsdyk, Gary Cross, Josephine Viera, and Ron Tonuzi,
- (e) any person the Parties have agreed to in writing; and
- (f) any person granted access to Confidential Information upon the motion of a Party and the Order of the Presiding Officer

4 **Prerequisites to Disclosure:** It is the responsibility of each Party to this action to ensure that persons receiving Confidential Information properly designated pursuant to this Protective Order have knowledge of the terms of this Protective Order and agree to be bound by them. Persons admitted to the Protective Order, other than those admitted pursuant to Subsections 3(a) and (b), shall first read this Protective Order and execute a copy of the Agreement to Abide by the Terms of Protective Order attached hereto as Exhibit A. A Party seeking to have any person granted access pursuant to Subsection 3(e) shall provide a copy of the executed Agreement to Abide by the Terms of Protective Order to each other Party. By the close of the second business day, each other Party shall notify in writing the Party seeking to have the person granted access whether it consents or objects to access being granted. If the Parties are unable to reach an agreement regarding an objection, the Party seeking access may present the matter to the Presiding Officer and shall bear the burden of establishing the need to provide such person access to the Confidential Information. Such person shall not be given access unless and until each other Party consents in writing or the Presiding Officer authorizes such access.

5 **Manner of Designation:** Information shall be designated by the producing Party as Confidential Information in the following manner:

- (a) in the case of information contained in a document, answer to interrogatory, answer to request for admission, response to a request for production of documents or other writing, by stamping or otherwise marking, in such a manner as not to interfere with the legibility of the documents, the word "Confidential" on the face thereof at the time of production or copying;
- (b) in the case of information contained or revealed in a deposition, whether in a question, answer or exhibit, by noting the designation on the record at the time of the deposition, or within thirty (30) days after receipt of the original deposition

transcript. The transcript pages and any associated documents containing Confidential Information shall be bound separately and shall contain on each page, including the cover page, an appropriate notation identifying it as Confidential Information,

- (c) in the case of information contained or referenced in legal documents filed with the Commission, including, but not limited to, motions and legal memoranda in support, the Parties shall seek to reach agreement regarding the release of information, failing such an agreement by stamping or otherwise marking, in such a manner as not to interfere with the legibility of the documents, the word "Confidential" on every page containing or referencing the Confidential Information. Such documents shall be filed with the Commission under seal. A Party that files a document in accordance with this Section containing Confidential Information shall promptly serve on the other Party who produced the Confidential Information a proposed redacted copy of the document with the claimed protected information deleted and clearly marked "Proposed Redacted Copy" in the upper right-hand corner of the first page. Within three (3) business days after their receipt of the proposed redacted copy, the receiving Party shall advise the Party originating the document of any additional redactions it requires. The originating Party shall promptly provide the other Party with a copy of the document from which all information that any Party has requested be redacted has been redacted and clearly marked "Agreed-Upon Redacted Copy — May be Made Public" in the upper right-hand corner of the page. During the three-day period, the proposed redacted copy shall be treated as protected. At the expiration of the three-day period, or when agreement is reached, the agreed-upon redacted copy shall be filed with the Commission by the originating Party;
- (d) in the case of information exchanged prior to the entry of this Protective Order, by procedures adopted by counsel for the Parties, which procedures shall be consistent with those specified in Subsections (a) - (c) of this Section 5

6 **Responsibilities of Recipients of Confidential Information:** The requesting Party and each person to whom Confidential Information is disclosed shall exercise, in maintaining the confidentiality of any Confidential Information, at least as high a degree of care and diligence as the requesting Party would normally exercise with regard to proprietary information which it maintains as secret and confidential which degree of care and diligence shall not be less than that which a reasonable person would exercise in maintaining the confidentiality of proprietary information of great value. The attorneys of record are responsible for employing reasonable measures, consistent with this Protective Order, to control duplication of, access to, and distribution of copies of Confidential Information. It is the responsibility of all persons receiving materials containing Confidential Information that it is properly marked to maintain such materials in a secure and appropriately identified manner

7 **Challenging Designations:** The designation as Confidential Information by the producing Party shall not waive or affect in any way the right of the receiving Party to contest the designation of confidentiality. The designation of confidentiality may be contested as follows

- (a) Counsel for the Parties shall confer in a good faith effort to resolve any differences.
- (b) Failing agreement of the Parties, the Party objecting to the designation of information as Confidential Information may file an appropriate motion with the Presiding Officer and shall (1) certify that he has sought in good faith to confer with opposing counsel and has been unable to resolve the dispute by agreement; and (2) identify by specific category or document number the information for which relief is sought.
- (c) Within ten (10) business days of receiving such a motion, the opposing Party shall respond to the motion by showing with particularity with respect to each challenged item of Confidential Information, the reasons why such information has been designated properly as Confidential Information.
- (d) The burden of establishing that information is Confidential Information shall be on the Party designating it as confidential
- (e) If a response is timely made as provided in Subsection (c) above, until the motion is ruled upon by the Presiding Officer, the designation of confidentiality shall remain in full force and effect and the information shall continue to be accorded the treatment required by this Protective Order

8 **Information Otherwise Available:** The protections of this Protective Order shall not apply to information that (a) is in the public domain, (b) was previously known by or in the possession of the receiving Party, so long as the receiving Party was under no obligation to maintain the information as confidential or restrict its disclosure; or (c) is obtained by or made available to a receiving Party or to others without restriction or other obligation of confidentiality by another person having the right to make such disclosure. Nothing herein shall limit The Port Authority of New York and New Jersey from disclosing its Confidential Information, as required by the Freedom of Information Policy and Procedure adopted by The Port Authority of New York and New Jersey, except that in no case shall this be construed to permit The Port Authority of New York and New Jersey to disclose any of Maher's designated Confidential Information pursuant to such Freedom of Information Policy or other Port Authority of New York and New Jersey policy

9 **No Waiver of Protections for Inadvertently Disclosed Confidential Information:** The inadvertent production of or failure to designate any information as Confidential Information shall not be deemed a waiver of the producing Party's claim of confidentiality as to such information, and the producing Party may thereafter designate such information as Confidential Information subject to the limitations and requirements of this Protective Order

10 **Return of Inadvertently Disclosed Confidential Information:** A Party that receives an inadvertent disclosure of Confidential Information that does not contain a "Confidential" designation shall, upon timely written request from the producing Party, treat such information as Confidential Information in accordance with this Protective Order Upon receipt of such

written notice, the receiving Party of such previously undesignated material shall return the inadvertently disclosed Confidential Information to the producing Party, which shall affix appropriate markings to such material and produce the appropriately designated Confidential Information to the receiving Party in a timely fashion. Further, the receiving Party shall make all reasonable efforts under the circumstances (1) to retrieve all previously undesignated Confidential Information that has been disclosed to persons other than those authorized to receive Confidential Information by this Protective Order; and (2) to prevent further use or disclosure of the information contained in the previously undesignated material by or to persons other than those so authorized by this Protective Order

11 Return of Inadvertently Disclosed Privileged or Otherwise Protected Information, Without Waiver of Protections: When the inadvertent or mistaken disclosure of any information, document or thing protected by privilege or work-product immunity is discovered by the producing Party and brought to the attention of the receiving Party, the receiving Party's treatment of such material shall be in accordance with Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502. However, nothing herein restricts the right of the receiving Party to challenge the producing Party's claim of privilege if appropriate within a reasonable time after receiving notice of the inadvertent or mistaken disclosure.

12. Acceptable Use of Discovery Including Confidential Information: All discovery including Confidential Information as defined by Paragraph 2 produced in the course of this litigation, including documents and testimony, shall only be used for purposes of this Proceeding, the 07-01 Litigation, and/or the 08-03 Litigation, and for no other purpose whatsoever except as otherwise permitted by this Protective Order, required by law, or subsequently agreed to by the Parties.

13 Parties' Own Use of Confidential Information: Nothing in this Protective Order shall prevent any Party from using or disclosing its own Confidential Information.

14 Applicability: This Protective Order shall apply to discovery produced by (a) the Parties, (b) all parties that may be made part of this Proceeding, which may execute and become party hereto, and (c) third-parties producing information as part of the Proceeding, which may execute and become party hereto, and their counsel and their respective successors or assigns.

15 Disclosure of Confidential Information Pursuant to Legal Process: If Confidential Information in the possession of the receiving Party is subpoenaed or sought pursuant to discovery or other legal process by any court, administrative body, or any other person purporting to have authority to subpoena or otherwise obtain such information, the Party to whom the subpoena, request, or order (hereinafter, "Subpoena") is directed shall give written notice of the Subpoena (including the delivery of a copy thereof) to counsel for the Party that produced the information or documents promptly after the receipt of the Subpoena. In the event that the Subpoena purports to require production of such Confidential Information on less than seven (7) days notice, the Party to whom the Subpoena is directed shall give immediate e-mail and written notice by overnight courier of the receipt of such Subpoena, and forthwith hand deliver a copy thereof, to the attorney for the producing Party. In this circumstance, whoever asserts the confidentiality of the information in question shall have the burden of defending against the Subpoena. If an order is sought in another Proceeding for the disclosure of

Confidential Information in this Proceeding, once this information comes to the attention of a Party it shall immediately notify the other Party and the tribunal or entity considering such an order that the information sought is Confidential Information in this Proceeding and provide the tribunal a copy of this Protective Order. No Party shall disclose another Party's Confidential Information without giving the producing Party an opportunity to seek an order governing disclosure of the requested information. A Party that has received a Subpoena in another proceeding requesting the disclosure of Confidential Information in this Proceeding shall make every reasonable effort to cooperate with the Party that has asserted confidentiality to protect the confidentiality of the information. Confidential Information protected by this Protective Order shall not be disclosed pursuant to the Freedom of Information Policy and Procedure adopted by The Port Authority of New York and New Jersey, and The Port Authority of New York and New Jersey shall respond to any requests for such information by asserting the appropriate enumerated exceptions therein, including but not limited to exception 1 for "confidential or privileged" records.

16 **No Waiver of Objections:** This Protective Order shall not enlarge or affect the proper scope of discovery in this Proceeding or any other litigation, nor shall this Protective Order imply that discovery material designated as Confidential Information under the terms of this Protective Order is properly discoverable, relevant, or admissible in this Proceeding or any other litigation. The entry of this Protective Order shall not be construed as a waiver of any other objections which may be asserted during the course of this Proceeding (including any appeal), or to require production of any document deemed to be Confidential Information. Entering into, agreeing to, or otherwise complying with the terms of this Protective Order, including producing or receiving Confidential Information. (a) shall not prejudice in any way the rights of a Party to object to any discovery request seeking production of information it considers not subject to discovery; (b) shall not prejudice in any way the rights of a Party to seek a determination by the Presiding Officer or the Commission that any requested discovery be made, (c) shall not be an admission by any Party of any fact, issue or contention in this or any other proceeding; and (d) shall not be construed to affect the admissibility of any document, material or information at any trial or hearing.

17 **Return and Disposal of Confidential Information:** Within sixty (60) days after the conclusion of this Proceeding, including any appellate proceedings, all Confidential Information (including copies and documents containing information derived therefrom) shall be destroyed or returned to the producing Party, at the election of the receiving Party, provided that documents previously filed with the FMC containing such Confidential Information may either be destroyed or retained under seal and preserved in accordance with the terms of this Protective Order. In addition, notwithstanding the foregoing, each Party may maintain one copy of all pleadings, motions, and all other papers filed with the Commission, and one copy of each deposition transcript, including all exhibits thereto, that contain Confidential Information.

18 **Modification; Third Parties:** Third-parties who are requested to produce documents or things or provide testimony in this action may avail themselves of the provisions of this Protective Order by endorsing it, and becoming a Party hereto, and may designate and produce documents, things, or testimony containing Confidential Information in accordance with its provisions without further action by the Commission. Nothing in this Protective Order shall prevent any Party or other person from seeking other written modification of this order.

19 **Severability:** The invalidity or unenforceability of any one or more phrases, sentences, Paragraph, or Sections in this Protective Order shall not affect the validity or enforceability of the remaining portions of this Protective Order or any part thereof.

20 **Supersedes Prior Agreements:** This Protective Order supersedes any prior understanding or agreement between the Parties regarding Confidential Information in this Proceeding, except that any information produced in the 07-01 Litigation, and designated Confidential Information pursuant to the Protective Order, dated September 25, 2007, in that litigation (the "07-01 Protective Order") will be governed by the 07-01 Protective Order, and any information produced in the 08- 03 Litigation and designated Confidential Information pursuant to the Protective Order, dated September 15, 2008, in that litigation (the "08-03 Protective Order") will be governed by the 08-03 Protective Order, to the extent used in this Proceeding.

21 **Entire Agreement:** This Protective Order sets forth the entire understanding between the Parties regarding Confidential information and shall be binding upon all successors of all of the Parties or as to any documents produced that contain Confidential Information in this Proceeding.

22. **Survival:** The provisions of this Protective Order shall survive and remain in full force and effect after the entry of final judgment, including any appellate proceedings, in this case.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

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**ATTACHMENT A TO PROTECTIVE ORDER
AGREEMENT TO ABIDE BY THE TERMS OF PROTECTIVE ORDER**

I acknowledge that I have read the foregoing Protective Order in connection with the above-captioned proceeding and understand its contents, and hereby agree to abide by its terms and conditions. I understand that failure to so abide by its terms could expose me to sanctions and punishment in the nature of contempt.

I solemnly promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Order and that I will not use, benefit from, or employ any information subject hereto except in connection with this litigation and in no case will any such information be used in any commercial negotiations or dealings.

I further agree to submit to the jurisdiction of the Federal Maritime Commission for the purpose of enforcing the terms of the Protective Order, even if such enforcement proceedings occur after termination of this action.

Name _____
Date _____